IN THE SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM, 1894.

No. 657.

WILLIAM M. FISHBACK, *et al*,
Appellants,
vs.
THE PACIFIC EXPRESS COMPANY,
Appellee.

APPELLEE'S BRIEF.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES, FOR THE EASTERN DISTRICT OF ARKANSAS.

I.

The remedy at law is inadequate.

(1) The bill shows a threatened multiplicity of suits. Whatever remedy the complainant would have at law, would be against the authorities of the several counties, nearly fifty in number, and require as many distinct suits in as many different counties, repeated every year. This is a well recognized head of equity jurisdiction.

(2) It is not necessary, in order to sustain the remedy in equity, to show there is *no* remedy at law. It is sufficient if the remedy at law be substantially *less* adequate than in equity. In *Kilburn vs. Sunderland*, 130, U. S., 505, this court said:

"The jurisdiction in equity attaches, unless the legal remedy, both in respect to the final relief and the mode of

obtaining it, is as efficient as the remedy which equity would confer under the same circumstances."

And in *Sullivan vs. Portland &c. Co.* 94 U. S. 806, it was said:

"The objection that there is a remedy at law, is only available where such remedy is as plain, adequate and effectual as the remedy in equity."

(3) The bill makes out a case in which a right conferred by the constitution of the United States, or which has been taken under the protection of that constitution, is denied by the State. It is well settled by the decisions of this court, that the courts of the United States will enjoin the execution of an Act of the legislature of a state which denies a right which is conferred by, or which has been taken under the protection of, the constitution of the United States, where the execution of the Act will result in loss or injury to the complainant.

Osborn vs. Bank, 9 Wheat., 839.

Allen vs. Railroad Co., 114 U. S., 311.

Cummings vs. Bank, 101 U. S., 153.

Poindexter vs. Greenhow, 114 U. S., 270.

Bank vs. Britton, 105 U. S., 322.

Hills vs. Bank, 105 U. S., 319.

Boyer vs. Boyer, 113 U. S., 689.

Pennoyer vs. McConnaughy, 140 U. S., p. 1.

In *Allen vs. R. R. Co., supra,* the railroad company had tendered in payment of certain taxes, the coupons of bonds issued by the State of Virginia, which, by the law under which they were issued, were receivable in payment of the taxes. The state had subsequently passed an act prohibiting the receipt of these coupons in payment of the taxes. One ground upon which the complainant demanded relief in equity, and by injunction, was, "because it is necessary

to protect complainant in the immunity to which it is entitled by virtue of the contract with the State of Virginia, secured against state laws impairing its obligation, by the constitution of the United States."

The remedy in equity was sustained on this ground. This court said:

"The exercise of that jurisdiction and by means of that remedy in such cases, is to vindicate the supremacy of the constitution, and to maintain the integrity of the powers and rights it secures; and that jurisdiction is vested in the courts of the United States because the cases embraced in it, are necessarily cases arising under the constitution and laws of the United States. Where the rights in jeopardy are those of private citizens, and are of those classes which the constitution of the United States either confers or has taken under its protection, and no adequate remedy for their enforcement is provided by the forms and proceedings purely legal, the same necessity invokes and justifies, in cases to which those remedies can be applied, that jurisdiction in equity vested by the constitution of the United States, and which cannot be effected by the legislation of the states."

(4) The case at bar does not fall within the cases recently decided by this court of *Walter vs. Northeastern R. R. Co*, 147 U. S., 370, and *Northern Pacific R. R. Co. vs. Walker*, 148 U. S., 391.

In the first of the two cases just mentioned, the Northeastern R. R. Co. of South Carolina brought its bill directly against the treasurer and sheriff of several counties in that state, to enjoin them from proceeding to collect taxes in their respective counties, and it did not appear from the averments of the bill, that the amount of taxes claimed by either one of the defendants, or by the county represented by such defendant, exceeded the sum of $2000, exclusive of interest and costs. The other case was of precisely the same character, and so found by this court. In each case there was a joinder of different defendants for the purpose of restraining the collection of *several* sums on account of

taxes due to *several* districts, neither of which sums brought the case within the jurisdiction of the Circuit Court. The object of the bill in each case, was simply and solely to restrain the collection of the several sums, then demanded.

The bill in the case at bar is materially different. The Board of Railroad Commissioners of the State of Arkansas, were the principal defendants, and the county clerks of the various counties, and subsequently the tax collectors, were made parties defendant for ancillary purposes only. The bill avers that the amount in controversy exceeds the sum of $2000.00, exclusive of interest and costs, and this allegation is admitted by the demurrer. The principal object of the bill was to restrain the execution of an unconstitutional act of the legislature, and not merely to restrain the collection of particular taxes for a single year. It sought a discovery from the members of the board of railroad commissioners, and a decree declaring the act of the legislature, and also the acts of the board of railroad commisioners pursuant to the act of the legislature, to be unconstitutional and void, and cancelling and rescinding the acts of the board of railroad commissioners. It was not merely proper, but necessary, in order to make any decree rendered in this cause effective, that the county officers of the several counties be joined as defendants, in order that their acts about to be done pursuant to the unconstitutional act of the legislature and of the board of railroad commissioners, should not be carried into execution. It is true that in entering the decree, the court merely restrained the defendants (all of them) from proceeding in any manner to enforce the collection of taxes assessed against the property of the complainant, under the assessment made by the defendants Fishbach, Armisted and Mills, composing the board of railroad commissioners, and in this respect the decree was not as broad as the averments and prayer of the bill justi-

fied; but this is due to a mere oversight in framing the decree, and an unfortunrte one, which has necessitated the filing of another and original bill against the railroad commissioners, in the court below. But this fact does not militate against the jurisdiction of the court. Under the averments and prayer of the bill, it is obvious that its object was not limited to restraining the collection of particular taxes for a given year, and that it was to perpetually restrain the execution of the act of the legislature by the board of railroad commissioners and their successors. The jurisdictional amount in such a case is determined by the value of the object of the bill, and this being averred in the bill to be more than the sum of $2000.00 exclusive of interest and costs, and admitted by the demurrer, I think it is decisive of the question.

II.

The act of the legislature of Arkansas, a copy of which is set out tn the printed record at page 13, requires the assessment and taxation of, and the assessment of the complainant's property made pursuant to the Act does in fact, assess for taxation, property and values not situated within the state, or subject to its jurisdiction.

Under the averments of this bill, the proposition above stated is simply indisputable. It is shown:

(1) That by the express terms of the Act (Sec. 2) the board of railroad commissioners in making the assessment, are peremptorily required to ascertain the value of the entire capital stock of the plaintiff, and to take such proportion of the valuation thus ascertained, as the number of miles of railway over which the plaintiff has its business transported within the State of Arkansas bears to the entire number of miles of railway within and without the state, over which the plaintiff has its business transported,

and the portion of the aggregate value of the capital stock of the company thus ascertained, the board is required to fix as the "sum at which the property" of the plaintiff shall be assessed in the State of Arkansas for the purpose of taxation.

(2) That the value of the property of the plaintiff of every kind and description situated within the State of Arkansas, did not bear the same proportion, or nearly the same proportion, to its property in any other state, that the whole number of miles of railway within the State of Arkansas over which plaintiff carried on its business, bore to the whole number of miles of railway within such other state over which plaintiff carried on its business therein.

(3) That the value of plaintiff's property of every kind and description situated within the State of Arkansas did not bear the same, or nearly the same proportion, to all of the property owned by it, and represented by its capital stock, as the number of miles of railroad within the State of Arkansas over which plaintiff carried on its business, bore to the whole number of miles of railroad within and without the State of Arkansas over which the plaintiff carried on its business.

(4) That in many of the states in which the plaintiff carried on its business, the value of its property situated in such states, was much greater per mile of railroad over which it carried on its business in such states, than the value of its property situated in the State of Arkansas was per mile of railroad, within the last named state, over which plaintiff carried on its business.

(5) That the ratio of value of all of the property owned by the plaintiff of every kind and description situated within the State of Arkansas, to the value of the whole of plaintiff's property wherever situated, was much

less than that which the number of miles of railroad within the State of Arkansas over which plaintiff carried on its business, bore to the whole number of miles of railroad within and without the State of Arkansas over which plaintiff's business was carried on.

(6) That the value of the whole of plaintiff's property within the State of Arkansas, was approximately equal to no more than one one-hundredth part of the value of the whole of the property owned by the plaintiff and represented by its capital stock, while the number of miles of railway over which plaintiff carried on its business within the State of Arkansas, was equal to more than eight one-hundredths of the whole number of miles over which plaintiff carried on its business.

(7) That the value of the whole of plaintiff's property situated within the State of Arkansas, of every kind and description, was only seven thousand seven hundred ninety-five and 67-100 dollars, whereas the assessment made by the board of railroad commissioners pursuant to the Act in controversy, amounted to two hundred and fourteen thousand, four hundred and forty-three dollars. ($214.443.)

It is perfectly obvious that the scheme of taxation proposed by the Act in question, will not operate alike in the different states in which the plaintiff carried on its business, because its effect and operation depends upon conditions not in any manner fixed or controlled by the terms of the Act, and varying in the different states. In states like Ohio, Indiana, Illinois, Missouri and others, thickly settled, wealthy communities, with large commercial centers, affording a large volume of business, it is too clear for controversy that the company is required to have for the transaction of its business, more property in value per mile of railway over which its business is transported, than in a sparcely settled state, not fully developed,

having no large commercial centers, and where the business transacted is small, by comparison. The State of Arkansas belongs to the latter class. It is among those in which the business of the complainant is the least, as compared with the number of miles of railway upon which the complainant had its business carried.

It will readily be seen from the facts already stated, that the aggregate assessment, amounting to two hundred and fourteen thousand four hundred and forty-three dollars, ($214,443,) bears no relation whatever to the value of the property of every description owned by the plaintiff and situated or used within the State of Arkansas at the time of making the assessment, and that the method prescribed by the Act could not in the nature of things, unless by some chance, produce even an approximately fair estimate of the value of plaintiff's property, subject to taxation within the state. The same scheme appplied in some states, and honestly administered, would produce an under-valuation, but it is obvious that only by chance could it produce a valuation approximately near the truth. The Act does not permit the exercise of any judgment or discretion on the part of the board of railroad commissioners; it is mandatory, and requires them to proceed according to its inflexible rule, a rule which can produce nothing but an arbitrary result, to fix the "sum" at which the plaintiff's property shall be assessed for taxation, without the least reference to whether the "sum" represents the value of the subjects of taxation situated within the state, or not. Indeed, it seems nearly impossible to resist the conclusion that the deliberate purpose was to extend the power of taxation beyond the jurisdiction of the state; that purpose being imperfectly concealed under the declaration that the "sum" shall be the assessment of the plaintiff's property "in this state for purposes of taxation."

It is obvious that the effort of the legislature was to keep within the decisions of this court in *Western Union Telegraph Company, vs. Massachusetts*, 125 U. S., 530; *Massachusetts vs. Western Union Telegraph Company*, 141 U. S., p. 40; and *Pullman's Palace Car Company, vs. Pennsylvania*, 141, U. S. p. 18; but so far as the question now under discussion is concerned, the mistake was in seeking to apply to the State of Arkansas a scheme for taxation of express companies, which, in the richer and more populous states of Massachusetts and Pensylvania, had not been found obnoxious to the objection we are now discussing, when applied to telegraph and sleeping car companies.

We think the three cases above referred to, are not at all controlling, and are easily distinguished from the case at bar. In *Western Union Telegraph Company vs. Massachusetts, supra*, an Act of the legislature of Massachusetts provided for ascertaining the value of the property for the Western Union Telegraph Company for purposes of assessment and taxation, by a method somewhat similar to that prescribed by the Act of the legislature of Arkansas. The real point decided in that case, was, that the property of the telegraph company was not exempt from taxation by the state because of the rights acquired by it under the Act of Congress of July 24th, 1866—now Sections 5263 to 5269 of the Revised Statutes. The contention of the telegraph company was, that by virtue of these Acts of Congress, it had acquired franchises from the United States, and that the Act of the legislature of Massachusetts imposed a tax upon these franchises, and that it was, therefore, void. This contention was denied by this court, holding, notwithstanding the terms in which the Act of the legislature described the tax imposed, that it was not, in fact, a tax upon the Company's franchises, but that it was a tax upon its property situated within the state, and that the details of the Act

prescribing the method for determing the value, were merely the means adopted by the legislature for determining the value of the property of the company situated and used within the state. But it is important to bear in mind, that there was in that case, no contention that the method prescribed by the law for ascertaining the value of the telegraph company's property operated to produce inequitable results, or that the Act required, or that the assessment made pursuant to it by the state officers, actually eperated to include property not situated within the state. It was not shown or claimed, that the mileage of the company within the state was greater in proportion to the whole of its mileage everywhere, than the value of its property situated within the state was to the whole of its property wherever situated; nor was it claimed or shown, that the amount of the assessment against the company by the State of Massachusetts pursuant to the Act, was in fact, in excess of the real value, or the fair assessable value, of property of the company situated or used within the the state. Probably no such contention could have been successfully made, the state being small in its territorial extent, but having a large population, large cities and towns, and a large commercial business, making it necessary the company should have within the state a large amount of property for the transaction of its business, in proportion to the mileage of its lines within the state. Indeed it is clear, that this court was greatly inflnenced by these considerations in the the decision of that case, for it is said in the opinion:

"We think it should appear that the corporation is *injured* by some principle or rule of the law not equally applicable to other objects of taxation of like character."

And also:

"It is very clear to us, when we consider the limited territorial extent of Massachusetts, and the proportion of

the length of the lines of this company in that state to its business done therein, with its great population and business activity, that the rule adopted to ascertain the amount of the value of the capital engaged in that business within its boundaries on which the tax should be assessed, *is not unfavorable to the corporation*, and that the details of the method by which this was determined, have not exceeded the fair range of legislative discretion. We do not think that it follows, necessarily, or as a fair argument, from the facts stated in the case, *that there was injustice* in the assessment for taxation."

And nothing can be clearer than that there would have been injustice from the method of assessment prescribed by the Massachusetts statute, but for the fact, which may be presumed from the absence of any contrary contention, the method did not, in fact, in the State of Massachusetts, result in an over assessment or valuation, but rather an under valuation.

In referring to the opinion of this court in *Western Union Telegraph Company vs. Massachusetts, supra,* Mr. Justice Bradley, writing the dissenting opinion in the case of *Pullman's Palace Car Company vs. Pennsylvania, supra,* acknowledging that some of the Justices had been in doubt as to the proper decision to be made in that case, because of the objection that a proportion of the aggregate value of the capital stock of the company might have no relation whatever to the value of the property situated within the state, subject to its jurisdiction, used this language:

"But the difficulty of getting at the true value of the property within the state and of adopting any other rule for ascertaining, as well as the failure of the company to show that the rule adopted produced any unfair results, finally induced an acquiescence in the decision; but expressly on the ground that, though the tax was nominally on the shares of the capital stock of the company, it was in effect a tax upon the property owned and used by it in Massachusetts, the proportional length of the lines in that state to their entire length throughout the whole country, being merely used as the basis for ascertaining the value of the property."

There is one phase of the opinion in *Western Union Telegraph Co. vs. Massachusetts*, which is not to be overlooked, and is an important aid to our contention in the case at bar. It was clearly and distinctly held that the tax in that case was a tax upon the *property* of the telegraph company within the State of Massachusetts, notwithstanding the formal expression of the law made it a tax upon capital stock. It was only by reaching the conclusion that it was a tax upon property, that the tax could be sustained. In speaking of the law with reference to its real character and purpose, and the subject of taxation upon which it operated, this court said:

"But by whatever name it may be called, as described in the laws of Massachusetts it is essentially an excise upon the capital of the corporation. The laws of that commonwealth assume to ascertain the just amount which any corporation engaged in busineas within its limits shall pay as a contribution to the support of its government, upon the amount and value of the capital so employed by it therein."

And also:

"The tax in the present case, though nominally upon the shares of the capital stock of the company, is in effect a tax upon that organization on account of property owned and used by it in the State of Massachusetts; and the proportion of the length of its lines in that state to their entire length throughout the whole country, is made the basis for ascertaining the value of that property."

In *Massachusetts vs. Telegraph Company, supra*, the questions involved were the same as those involved in the case of *Western Union Telegraph Company vs. Massachusetts, supra*, and this court merely followed and adopted the opinion in the preceding case.

In *Pullman's Palace Car Company vs. Pennsylvania, supra*, the real contention was, that the property of the company (sleeping cars) employed in interstate traffic, was not subject to taxation by the state, notwithstanding it was

employed and used within the state during the course of such traffic. The assignments of error, as summed up in the brief of counsel for the company and considered by this court, were as as follows:

"The court erred in holding that any of the capital stock of the Pullman Company was subject to taxation by the State of Pennsylvania by reason of its running any of its cars into, out of or through, the State of Pennsylvania in the course of their employment in the interstate transportation of railway passengers."

It is obvious that the contention of counsel was, that the tax was a tax upon the capital stock of the Pullman Company, because of its use of its cars in interstate traffic, and upon that contention this court was asked to hold the Act to be void. It was also expressly stated in the majority opinion of this court, read by Mr. Justice Gray, that "The only question of which this court has jurisdiction, is whether the tax was in violation of the clause of the constitution of the United States granting to Congress the power to regulate commerce among the several states." The whole of the argument, in the majority opinion of the court, was devoted to showing that the tax was not a tax upon commerce, and that notwithstanding the phraseology of the law, the tax was in substance and effect a tax upon property—that part of the Pullman Company's property which was habitually used within the state. Incidentally, it was contended by counsel for the company, that the property (cars running into, out of, and through the state) had no *situs* in the state; but there was no contention that the Act, or its execution in the particular case, in fact operated to assess property not in any manner within the state, or that the property actually used within the state was not of equal or greater value than the sum at which it was assessed for taxation. The contention upon this point

was as to whether the use of the property within the state, as shown, gave it a *situs* there for the purposes of taxation. If there was property so used within the state as to give it a *situs* there, and the tax could be properly held to be a tax upon such property, the contention of the company would be defeated; and it was only by reaching an affirmative conclusion upon these propositions, that the majority of this court sustained the tax. It is obvious that this case is not at all against the appellee in the case at bar. It is, however, like the case of *Western Union Telegraph Company vs. Massachusetts, supra*, an important aid to our contention, because of the ruling that the tax in that case was a tax upon property. In speaking of the nature and character of the tax, this court said:

"The tax now in question is not a license tax or a privilege tax. It is not a tax on business or occupation; it is not a tax on, or because of, the transportation or right of transit of persons or property through the state to other states or countries. The tax is imposed equally upon corporations doing business within the state, whether domestic or foreign, and whether engaged in interstate commerce or not. *The tax on the capital of the corporation on account of its property within the state, is in substance and effect a tax on that property.*" (Citing authorities.)

And also the following:

"The mode which the State of Pennsylvania adopted to ascertain the proportion of the company's property upon which it should be taxed in that state, was by taking as a basis of assessment such proportion of the capital stock of the company as the number of miles over which it ran cars within the state, bore to the whole number of miles in that and other states over which its cars were run."

In each of the foregoing cases, notwithstanding the phraseology of the different acts of the legislatures of the several states, this court held the law to be merely the means or method adopted by the state for determining the value of the property situated within the state, and subject to taxation; but in neither case was it contended that the

execution of the law resulted in the assessment of property not within the jurisdiction of the state. Each case occurred in a state where, it may easily be believed, the amounts and value of property in the state would be large in proportion to the mileage within the state; and it is obviously not merely possible, but practically certain, that neither company could have made a showing that the assessment was, in fact, in excess of the value of the property subject to the jurisdiction of the state; or that the method of ascertaining the value for the purposes of taxation as prescribed by the law, if strictly followed, would result in the assessment of values not within the jurisdiction of the state, under the conditions existing in those states.

In *Minot vs. Railroad Company*, 85 U. S. (18 Wall.) 206, the legislature of the State of Delaware had passed an Act applicable to railroad and canal companies created by the laws of that state, and providing for taxation to be measured by taking the ratio of the whole of the company's property which the mileage within that state, bore to the whole mileage within and without the state. It was contended in that case that the Act operated to tax property not within the jurisdidtion of that state, the railroad company claiming that the tax was a tax upon its property. In the course of the opinion of this court it was said:

"In the second place, assuming that the tax is upon the property of the corporation, if the ratio of the value of the property in Delaware to the value of the whole property of the company be less than that which the railroad in Delaware bears to the entire length, and such is admitted to be the fact, a tax imposed upon the property in Delaware according to the ratio of the length of its road to the length of the whole road, *must necessarily fall upon property out of the state*. The length of the whole road is, in round numbers, 100 miles; the length in Delaware is 24 miles. The tax upon the property estimated according to this ratio would be in Delaware 24-100, or 6-25, of the amount of the tax upon the whole property; but the value of the property

in Delaware is not 6-25 of the value of the whole of the property, but much less than this proportion would require."

This court sustained the tax in that case, but it did so only by holding that the tax was not, in fact, a tax upon the *property* of the company. The corporation was a domestic corporation, and therefore subject to a personal tax, and this court held that the tax was neither imposed upon the shares of the individual stockholders, nor upon the property of the corporation, but was upon the corporation itself (which was in accordance with the letter of the law) "measured by a percentage upon the cash value of a certain proportional part of the shares of its capital stock."

The corporation in that case being a domestic corporation, this was a permissible tax; but it is obvious that if it had been a foreign corporation, not subject to such taxation, as is the case with the appellee at bar, and if the tax had been a tax upon its property, this court would have held that the Act and the assessment were void, because of the fact that they embraced property not within the jurisdiction of the state. In the case at bar it cannot be contended, we think, that the tax is anything less than a tax upon the property of the appellee. It does not purport to be anything different, and under the decisions of this court in the Massachusetts and Pennsylvania cases above referred to, it seems to be clear that it must be held to be a tax upon property. The case as stated in the bill is precisely what this court in the Minot case declared would be an invalid exercise of the taxing power.

The power of taxation is limited to persons, property or business within the jurisdiction of the State.

Tappan vs. Bank, 86 U. S. (19 Wall.) 490.

Cleveland &c R. R. Co. vs. Pennsylvania, 82 U. S. (15 Wall.) 300.

Union Pacific R. R. Co. vs. Penniston, 85 U. S. (18 Wall.) 5.

St. Louis vs. Ferry Co., 78 U. S. (11 Wall.) 423.

Gloucester Ferry Co. vs. Pennsylvania, 114 U. S. 196.

III.

The Act in question is in violation of that provision of the 14th Amendment to the Constitution of the United States which prohibits any state from denying to any person within its jurisdiction the equal protection of its laws; and in violation of that provision of the constitution of the State of Arkansas which requires all taxation to be uniform, in respect to the subjects upon which it is levied, and the method by which the amount is ascertained, within the district levying the tax.

The provision of the 14th Amendment to the constitution of the United States, and the provision referred to, in the constitution of the state, are equally provisions requiring equal and uniform laws, so far as they relate to the subject in controversy in this suit. There is no difference in principle, between these provisions, but the object of the provisions of the constitution of the United States, was to take the subject of equal legislation under the protection of the national constitution. Its purpose was to meet the case of states which, notwithstanding any provision in their own constitution, were led to pass unequal laws. Originally, the amendment was adopted for the protection of the Negro race in the Southern States, but it has been since repeatedly held by this court that its application cannot be restricted

to this class of persons, and that it embraces all persons of of every description, including corporations who, are within the jurisdiction of a state.

It is provided by the state constitution : "All property subject to taxation shall be taxed according to its value, that value to be ascertained in such a manner as the General Assembly shall direct, making the same equal and uniform throughout the state." (Sec. 5, Art. 6.)

The General Assembly has a discretion to prescribe the method by which the value of property for purposes of taxation shall be ascertained, but it must make the *method* equal and uniform throughout the state. The words "making the same equal and uniform throughout the state" relate to the method prescribed for ascertaining the value ; for, it is obvious that it could not have been the purpose of the constitution to require the "value" to be made literally "equal and uniform" throughout the state, and there can be no uniformity and equality of valuation or assessment, in a legal sense, in the absence of "equal and uniform" methods of assessment. As applied to the subject of taxation, these constitutional provisions require that all taxation shall be equal and uniform in respect to all persons and corporations, and in respect to all of the property within the jurisdiction of the state or taxing districts, under like circumstances and conditions.

Of course, it is not contended that the burden of taxation must fall with absolute equality on all persons. This has never been deemed attainable ; but there is a plain distinction between those inequalities which result from uncontrolable circumstances, and those which are created through design, or inadvertence, by the law making power itself. The first are inseparably connected with, and proceed from, the errors or infirmities of men. They do not contravene any *principle* of equality. The last are utterly

inconsistent with, and destructive of, every principle of equality.

It is broadly conceded that the legislature may classify persons and property, and all subjects of taxation, and it is only contended that when the legislature has legitimately and fairly exercised the power of classification, its legislation must operate equally and uniformly in respect to all persons, or in respect to all of the property included within the partiular class; but the power to classify is not an arbitrary power. It has, in its very nature, its own limitations. The exercise of it must be classification, in fact, and not discrimination. The moment it enters the domain of discrimination, it produces that inequality and lack of uniformity, which it is the intention of these constitutional limitations to prohibit. If the tax be a personal tax, it must operate equally upon all persons falling within the same class, and the classification can only be predicated upon an intrinsic difference of circumstances and conditions. If the tax be upon persons, or in its nature a personal tax, corporations may undoubtedly be classified (as persons) separately from individuals; so a particular class of corporations may be classified separately from other corporations. The same is true in respect of different kinds of business; but no matter whether the tax be levied upon persons, upon business, or upon property, its operation must be uniform and equal, and in the case of property, it must bear equally and operate uniformly, upon, and the methods of ascertaining the value must be the same, in respect of all property which legitimately falls within the same class. *Property cannot be classified in respect of mere ownership;* that is, the same kind and character of property, devoted to the same uses, within the same taxing districts, cannot be taxed by one method when owned by one class of persons, and by a different method when owned by a different class of per-

sons. It was the obvious purpose of the constitution of the State of Arkansas to prohibit this. It is not in the case at bar, a personal tax, or in the nature of a personal tax, but a tax upon property, and the scheme is an attempt to classify property with respect to its ownership by express companies, and to apply to it, when owned by express companies, a method of assessment and taxation different from that which is applied to the same class of property, devoted to the same uses, under the same circumstances and conditions, within the same taxing districts, when owned by other persons. This is forbidden by the constitution of the state, as well as by the 14th Amendment to the Constitution of the United States.

In Cooley on taxation, Page 160, it is said:

"A tax laid exclusively on merchants goods might not be burdensome to those who, in the first instance paid it, since the effect would only be to increase the price to the consumer, and thus to diffuse the burden through the whole community. A license tax might not be unjust, though laid upon a single occupation, provided that it was so laid that none who followed that occupation escaped it; let it reach all of a class, either of persons or things, it matters not whether those included in it be one or many, or whether they reside in a particular locality or are scattered all over the state; but when, for any reason, it becomes discriminative between individuals of the class taxed, and selects some for an exceptional burden, the tax is deprived of the necessary element of equality, and becomes inadmissible."

In many of the states laws have been passed providing schemes known as the "Unit System," for the taxation of the property of railroad companies, telegraph companies and sleeping car companies, whose lines extend through different taxing districts, and into different states, and these laws have been upheld by this, and the highest courts of the states; bnt there is an obvious distinction between the property of such companies, and the property of this appellee. In those cases the character of the property, its

situation, uncertain and changing *situs*, its peculiar use, and the extreme difficulty of assessing its value in parts, make it necessary to adopt some scheme applicable alone to these particular kinds of property. Classification in such cases, is not according to ownership, but according to the intrinsic difference in the character, uses and situation of the property. In the case of the railroad company, its right of way, road bed and superstructure, its cars and rolling stock, having no fixed *situs*, its telegraph lines, all being used in connection with, and indispensible to the use of, that portion of its property which has its *situs* in other districts or states, it is practically impossible to arrive at any valuation for the purpose of taxation of that portion situated within a particular district or state, without taking into consideration the value of the whole of the property wherever situated, and apportioning the value, in some degree at least, according to the mileage, or according to the relative amounts of business done within the particular district or state. The same thing is true in respect of telegraph companies, and in a different degree, to sleeping car companies, and perhaps of some other kinds of property, and it is upon these grounds, and for these reasons only, that the courts have sustained laws subjecting these particular kinds of property to a different method of assessment and taxation, from that which is applied generally to property within the district or state. The property, in those cases is classified, not according to its ownership, as in the case of express companies under the Arkansas Act, but according to the intrinsic difference in its character, uses, situation, and the difficulty surrounding the ascertainment of its value. These considerations make the separate classification of such property not merely convenient, but nesessary, as well as natural and reasonable.

No such reason can be found for the Act of the State of

Arkansas, so far as it applies to express companies. We do not own any "line" or "mileage" any more than a merchant does who ships his goods by rail. An assessment of "$136.00 per mile," as in this case, is an obviously fictitious thing. The property owned by this appellee is not different in its character, uses or situation, from other property situated within the state; nor is there any greater difficulty in ascertaining and assessing its value for the purpose of taxation. We do not make any different use of a horse, or horses, or wagon, of safes, office furniture, or of such other property as the bill shows the appellee to be possessed of within the state, from that which is made of the same kind of property by other inhabitants of the state. Its value is as easily ascertainable, and it is as susceptible of assessment, and in all respects as susceptible of taxation, in accordance with those laws which apply to the assessment and taxation of property generally within the state, as the great body of property which is subject to taxation.

In "*Kentucky Railroad Tax Cases*, 115 U. S., 321, railroad property had been classified for the purpose of taxation, and a different method of assessment and valuation adopted, from that which was applied to other classes of property. The railroad companies contested the validity of the tax upon the ground that the law was in violation of the last clause of the 14th amendment to the constitution of the United States. This contention on the part of the railroad companies was denied by this court; but the denial was put upon the ground that the Act of the legislature was a proper exercise of the power of the state to classify property for the purpose of taxation. In the course of the opinion it was said:

"The rule of equality in respect to the subject, only requires that the same means and methods be applied impartially to all constituents of each class, so that the law

shall operate equally and uniformly upon all persons in similar circumstances. There is no objection therefore, to the discrimination made as between railroad companies and other corporations, in the methods and instrumentalities by which the value of their property is ascertained. The different nature and uses of their property justifies the discrimination in this respect which the discretion of the legislature has seen fit to impose."

The classification in this case was, obviously, based upon an intrinsic difference in the character of the property, its situation, and the nature of the uses made of it, from that of other corporations and other tax payers. It was plainly an exercise of the power of classification; but the implication from what the court said, is, that if the legislature had attempted to adopt a different rule of taxation, or method of ascertaining the value of property which was of the same character and devoted to the same uses as that of other persons, the Act would have been in violation of the 14th Amendment.

A kindred question, involving the same principle, has been decided by the Circuit Court of the United States for the District of California in two cases, in each of which Mr. Justice Field, as well as Judge Sawyer, wrote an elaborate opinion.

County of San Mateo vs. Southern Pacific R. R. Co., 8 Sawyer.

County of Santa Clara vs. Southern Pacific R. R. Co., 9 Sawyer.

In the first of these cases, Mr. Justice Field said:

"Whatever the state may do, it cannot deprive any one within its jurisdiction of equal protection of the laws; and by equal protection of the laws is meant equal security under them, to everyone on similar terms, in his life, his liberty, his property and in the pursuit of happiness. It not only implies the right of each to resort on the same terms with others, to the courts of the country for the

security of his person and property, the prevention and redress of wrongs and the enforcement of contracts, but also his exemption from any greater burdens or charges than such as are equally imposed upon all others under like circumstances. Unequal exactions in every form, and under any pretence, are absolutely forbidden, and, of course, unequal taxation, for it is in that form that oppressive burdens are usually laid. It is not possible to conceive of equal protection under any system of laws where arbitrary and unequal taxation is permissible; where different persons may be taxed on their property of the same kind, similarly situated, at different rates; where, for instance, one may be taxed at one per cent on the value of his property, and another at two or five per cent, or where one may be thus taxed according to his color, because white, or black, or brown or yellow, or according to any other rule than that of a fixed rate proportionate to the value of his property."

And further on:

"What is called for under the constitutional provision requiring equality and uniformity in the taxation of property, must be equally called for by the 14th Amendment. The forced contribution from one, which would allow tax ation of his property without reference to a common ratio, would be inconsistent with that equal protection which the Amendment requires the state to extend to every person within its jurisdiction."

Judge Sawyer in speaking of the subject of classification in the same case, said:

"Different kinds of property may be required to be taxed in different forms and amounts, in order to be equally taxed, and classifications of property for purposes of taxation should have reference to the just equality of burdens so far as that is practially attainable. Classification should have reference to the different character, situation and circumstances of the property, making a different form or mode of taxing proper, if not absolutely necessary. It cannot be arbitrarily made with reference to the nationality, color or character, of the owners, whether natural or artificial persons, without any reference to the difference in the character, situation or circumstances of the property. If the arbitrary discrimination and classification found in this case can be legally made under the constitution and law of

the land, then the constitution, or the law, can be so framed as to dispose of a man's rights in property of all kinds, by arbitrary classification and definition, without regard to the real facts, circumstances or conditions of the property. A person may be classified and defined out of the equal protection of the law, and if so, with reference to this provision he can also be classified and defined out of uniformity in the operation of the law in other particulars; out of the protection of due process of law, and of the provision forbidding a law impairing the obligation of contracts, or taking property for public use without just compensation; and, indeed, out of all the guarantees of the constitution, state and national."

It is indisputably clear in the case at bar, that the State of Arkansas, while levying a tax, or prescribing methods for the assessment and levy of a tax, upon *property*, has attempted to classify the property according to its mere ownership, and to prescribe a method for its assessment and taxation different from that which is applied to the same kind and character of property, devoted to the same uses, under precisely the same circumstances and conditions, in the same jurisdictions, when owned by persons other than those named in the Act.

See further upon this subject:

Babier vs. Connelly, 113 U. S., 27.

Railroad Co. vs. Mackey, 127 U. S., 205.

Railroad Co. vs. Humes, 115 U. S., 512.

Dent vs. Virginia, 129 U. S., 114.

Insurance Co. vs. New York, 134 U. S., 594.

Yick Wo vs. Hopkins, 118 U. S., 356.

Pullman Car Co. vs. Texas, 64 Texas, 294.

People vs. Central Pacific R. R. Co., 83 Cal., 393.

In *Insurance Co. vs. New York, supra*, the question was simply whether or not a classification of corporations according to some peculiar characteristic was permissible, and it was held that it was; but this does not militate against

the position of appellee in the case at bar, because the tax was in its nature a personal tax, and it is undoubtedly true that corporations may be so classified, where they are subject to a personal tax, and the tax is of such a nature.

In *Yick Wo vs. Hopkins, supra,* an ordinance of the city and county of San Francisco, professing to regulate the business of laundries, prohibited the prosecution of such business without the written permission of the board of supervisors, except when located in a building constructed either of brick or stone. Ostensibly the ordinance merely required the party desiring to prosecute the business to obtain a lisence or permit therefor, but in fact, the granting of the permit, was left to the absolute and unrestrained discretion or will of the board of suprevisors. The ordinance was held to be in conflict with the 14th Amendment to the constitution of the United States, which prohibits any state to deny to any person within its jurisdiction the equal protection of its laws. This conclusion was reached, not merely because the ordinance made the right depend absolutely upon the will of the supervisors, but also because it was found to have been uniformly executed and administered with a view to discrimination against a class of persons. This court said:

"In the present case we are not obliged to reason from the probable to the actual, and pass upon the validity of the ordinances complained of as tried merely by the opportunities which their terms afford of unequal and unjust discrimination in their administration, for the cases present the ordinances in actual operation, and the facts shown establish an administration directed so exclusively against a particular class of persons, as to warrant and require the conclusion that whatever may have been the intent of the ordinances as adopted, they are applied by the public authorities charged with their administration, and thus representing the state itself, with a mind so unequal and oppressive as to amount to a practical denial by the state of that equal protection of the laws which is secured to the petitioners,

as to all other persons, by the broad and benign provisions of the 14th Amendment to the constitution of the United States. Though the law itself be fair on its face, and impartial in appearance, yet if it is applied and administered by public authority, with an evil eye and an unequal hand, so as practically to make an illegal discrimination between persons in similar circumstances material to their rights, the denial of equal justice is still within the prohibition of the constitution. This principle of interpretation has been sanctioned by this court." (Citing cases.)

We have, also, in the case at bar, the Act of the State of Arkansas complained of, in actual operation, and its effect and operation, unlike the cases in Massachusetts and Pennsylvania, heretofore cited, is, in our judgment, so clearly offensive to the constitutional limitations which we have been discussing, that we may fairly say the proposition does not admit of controversy.

The Act will not operate equally and uniformly even when considered with reference to the express companies alone and without regard to other owners of property, because it provides a method for fixing the "sum" to be taxed which has no relation to value. The "sum" does not depend upon the value of the property within the state, but upon the value of capital stock and the ratio of "miles" within the state to "miles" within and without the state. It is obvious that the assessment of the company may necessarily include the value of property not within the jurisdiction of the state, while the assessment of another will not; or, that the property of one company may be assessed at ten times its actual value, while that of another is assessed at less than its actual value. Take the case of a company barely running into the state, having its business transported over less than one mile of railroad within the state. It may reach a large city and have an expensive office and equipment. It is beyond controversy that there would be no equality between the assessment of a company in that situation under this act, and one whose "mileage"

was greater and its property proportionally less. Indeed, equality and uniformity under this act is not possible, even by chance.

Pittsburg &c. Co. vs. Backus, 154 U. S., 421-30

IV.

The Act of the State of Arkansas, and the assessment, violate the provision of the constitution of the State of Arkansas which requires all property to be taxed according to its value.

The constitutional provision is: "All property subject to taxation shall be taxed according to its value, that value to be ascertained in such manner as the general assembly shall direct, making the same equal and uniform throughout the state." Sec. 5, Art. 16.

This provision empowers the legislature of the state to prescribe the method by which the value shall be ascertained, but the method must be such as will, in fact, fix the true value, for, when the law speaks of value, it cannot be held to mean anything less or more than *true* value. It does not authorize the legislature to fix the value, or to declare that the value of *something else* shall be ascertained, and that such value shall be accepted and taken as the value of the property to be assessed. It requires the adoption of some method of assessment of the very property upon which the tax is to be levied, with a view to fixing the real value of such property. To provide for the assessment of the value of some other property and declare that such valuation or some arbitrarily ascertained proportion of such valuation, shall be the value ("sum") at which the property to be taxed shall be assessed for purposes of taxation, is a palpable violation of this constitutional provision.

It is the express and mandatory provision of the Act that the board of railroad commissioners shall "ascertain

the value of the entire capital stock" of the company; and, "shall thereupon fix the sum at which the property" of the company shall be assessed, by taking that proportion of the value of the entire capital stock which the mileage of railroad within the state upon which the company procures its goods to be carried, bears to the entire mileage, "within as well as without the state." The board has no discretion to determine the value of the property upon which the tax is to be laid. It fixes the value of the entire capital stock which is an entirely different thing, and which has no necessary or proper relation to the value of the company's property, or to that portion of the company's property which is situated or used within the state; and then the Act itself, by an arbitrary rule, which also has no relation whatever to the value of the property to be taxed, requires the board to fix the portion of the value of the entire capital stock which the rule produces, as "the sum at which the property" shall be taxed. The cost, or intrinsic, or market, value of the property, does not receive the slightest consideration. The scheme does not contemplate any ascertainment of the value of the property to be taxed.

We have said that the value of the capital stock of the company has no necessary or proper relation to the value of its property. This is true, because the value of the capital stock (*i. e.* the shares of stock), is largely due to the value of franchises, to successful management, good will, or established business, advantageous connections and contracts with carriers, exclusive and profitable territory, and other conditions affecting the earning capacity of the company. None of these have any *situs* in the State of Arkansas, the company having its domicile in Nebraska; nor, if they had, are they, by the laws of that state, subjects of taxation; nor do they enhance the value of property of the character set forth in the bill. *Shares* of capital stock may

be assessed to the owner at their value as enhanced by the consideration of these elements or factors of value; but these are the property of the stockholder, and not of the corporation. They would have a *situs* in Arkansas, only when the owners were domiciled there. The property used in trade by a merchant is not more valuable for purposes of taxation, than like property of his neighbor, because of successful management, advantageous location, established trade, good credit, and like considerations; yet, if the business be capitalized, the shares of the capital stock would be greatly enhanced in value because of them. The stock, grain, implements, and other personal property of a farmer, is not of greater value for purposes of taxation because of his successful management of his business, or the advantageous location of his farm, than the same property would be when owned by another farmer possessed of less sagacity or prudence, or carrying on his business in a less favorable location. The same is true of a bank, and nearly every other active business, as distinguished from mere passive investments. The value of the shares of the capital stock of a corporation is largely made up of these elements or factors of value, and for this reason is not to be taken, as this Act requires it to be taken, as an inflexible criterion for the value of the property of the company. Much less can it be said that the value of the entire capital stock has any necessary or proper relation to the value of that portion of the company's property which is situated or used within a particular state. Add to these considerations, the further fact that this Act takes a proportion of the value of the entire capital stock by an arbitrary rule, also having no relation to the value of the property situated or used within the state, and which, under the conditions averred in this bill, is logically certain to produce a sum many times in excess of the value of the property situated or used within

the state, and the conclusion for which we are contending becomes irresistible.

In the case of *Williams vs. Bettle, et al,* (State board of assessors,) 51 N. J. L., 512, the Act required the state board of assessors, if they should find the assessments made by local assessors upon the property of other persons, were *lower* than the state board had laid upon the property of a railroad company, to accept the valuation of the local assessors as a correct standard of value, and reduce their own assessment of the property of the railroad company accordingly. This was erring on the side of safety and protection to the tax payer, and is obviously less offensive to a fundamental rule requiring all the property to be taxed according to its value, than if it had authorized or required the state board to adopt a valuation in excess of that fixed by their own judgment, or to fix a "sum" by a rule that did not admit of the exercise of any judgment whatever by the board, or any other person or tribunal. But the New Jersey court held the Act of that state to be unconstitutional, and it was said in the course of the opinion:

"It is impossible to vindicate the constitutionality of this section. The constitution requires that property shall be assessed for taxes according to its true value. In carrying out this provision, of course it is necessary that the judgment of some person should be taken as the final criterion of the true value of each parcel of property assessed, and it undoubtedly falls within the province of the legislature to say who this person shall be. If the legislature had directed the local assessors to determine the true value of property used for railroad purposes in their several districts and the state board to fix the tax upon the value so ascertained, the constitutional injunction would have been satisfied; but no such enactment exists. The local assessors have no authority to determine the true value of property nsed for railroad purposes, nor is such a power conferred upon any person except the state board of assessors, and the Supreme Court on *certio rari.* The legislature might lawfully require the state board and the Supreme Court, in exercising this function, to *consider* the estimate

which the local assessors put upon other than railroad property, but they cannot require the acceptance of this estimate as the correct standard of the value of railroad property. *The property so taxed would be assessed, not according to its own true value, but according to the true value of some other property.* Such a tax the legislature cannot sanction. This attempt of the legislature to substitute for the 'true. value' of railroad property, 'the assessed value of the real estate of persons other than railroad or canal corporations," 'as a correct standard of value' for railroad property, is unconstitutional, and must fail."

Since the decree was rendered in the case at bar, this court has decided the cases of *Cleveland &c. R. R. Co., vs. Backus,* and *Pittsbury &c. R. R. Co. vs. Backus,* 154 U. S., 421 and 440.

In the case of the Pittsburg Co. it was said:

"The certificate of the state board does not show that it reached its determination of the value of the property in Indiana, by first ascertaining the total value of the company's property, and then dividing it on the mileage basis. It simply shows that it *considered* the matters by which the statute were required to be presented to it by the railroad company, as well as all other matter, which, in its judgment, bore upon the question of value, and from such consideration reached the result announced, to wit, the value of that part of the company's road in the State of Indiana. Evidence that there were peculiar matters which gave to portions of the road outside of Indiana an enormous value, as compared with the general line, does not prove that the board did not take those peculiar matters into consideration. On the contrary the reasonable presumption is, that if its attention was called by the company, to those facts, it did take them into consideration, in connection with the information derived from the total amount of stock and indebtedness of the company. Indeed, its certificates shows affirmatively, that it did take into consideration all other matters pertaining thereto that would assist the board in arriving at a true cash value of the parts of the road within the State of Indiana.

But in the case at bar, the act of the legislature does not permit the board of railroad commissioners to "consider" matters affecting the value of the defendant's proper-

ty within the State of Arkansas, but arbitrarily requires the board to ascertain the value of the whole of the defendant's capital stock, and fix such proportion of the value so ascertained, as the mileage operated by the defendant within the State of Arkansas bears to the whole of the mileage operated by the defendant everywhere, as the sum to be assessed for taxation within the State of Arkansas.

In the case of the Cleveland Company it was said:

"The true value of a line of railroad is something more than an aggregation of the values of separate parts of it, operated separately. It is the aggregate of those values, plus that arising from a connected portion of the whole, and each part of the road contributes, not merely the value arising from its independant operation, but its mileage proportion of that flowing from a continuous and connected portion of the whole. This is no denial of the mathematical proposition that the whole is equal to the sum of all its parts, because there is a value created by, and resulting from the combined operation of all its parts, as one continous line."

But this cannot be said of the property of the appellee in the case at bar. It is unlike the property of a railroad company. It is not true that the value of that part of its property situated within the State of Arkansas, is the aggregate of the value of such property "plus that arising from a connected operation of the whole," or, that its operation in one state contributes to the value of its property situated in another state. Its property situated in Arkansas has no added value "created by, and resulting from, the combined operation" of the whole of its property wherever situated.

If the Act in the case at bar had directed the board of railroad commissioners to *consider* the value, as they should find it, of the entire capital stock of the company, in determining the value of that portion of appellee's property which was situated or used within the state, the constitutional

injunction here discussed might not have been violated; but board is not directed to "consider" the value of the capital stock, but it is commanded to ascertain that value, and having ascertained it, to take an arbitrary proportion of it, and fix that as the "sum" at which the property within the state shall be taxed. The Act in question is obviously more offensive to the rule requiring the taxation of property to be based upon value, than was the New Jersey Act in the case above cited. It does not seem necessary to us to discuss this question further, or to reinforce our position by further citations.

V.

The appellee was not required to pay or tender taxes upon its property within the state.

It was impossible for appellee to have done either. The assessment upon values not within the jurisdiction of the state is inseparably blended with those values which may have been properly applied to property within its jurisdiction. The appellee could neither pay, nor tender, taxes upon such property as might have been legally assessed, nor was it under any obligation, legal or equitable, to do so. The state neither authorizes nor requires the owner of property to assess it himself for purposes of taxation, nor can the state require such a thing, or require the owner to pay or tender payment upon property which has not been assessed, under a system which provides for the assessment of the property of other persons. Such a requirement would be destructive of the rule of equality and uniformity, to secure which, the constitutional limitations, state and federal, which we have been discussing in the foregoing divisions of this brief, were adopted. It can no more be required by the courts than by act of the legislature of a state. It will not do to say, that if the owner fixes the value upon his own

property, he cannot be prejudiced. This would be to substitute something else for constitutional equality and uniformity, and would not be uniformly true, in point of fact; but whether true or not, the citizen or "person" may stand upon his right to this equality or uniformity, and until it is secured to him he is under no legal or equitable obligation to move in accordance with some other rule, which ignores the constitutional right. It is the equality and uniformity of these constitutional provisions, not that which may be prescribed by the court, that the citizen or "person" is entitled to. This means an assessment or valuation of the property to be taxed, not according to the judgment or conscience af the owner, but according to the methods prescribed by the legislature for all property belonging to the same class. This is expressly guaranteed by the state constitution, and is no less clearly within the broad provision of the fourteenth amendment to the federal constitution guaranteeing to all persons within the state the equal protection of its laws—"the protection of equal laws." To require the property owner to pay or tender payment upon his own estimate of value, which is not an assessment, or in the nature of an assessment, is to require him to waive this constitutional right, as a condition precedent to an appeal to the courts to protect him in the enjoyment of it. An assessment under these constitutional limitations is a primary and essential step, without which there is no power to tax property. The courts cannot substitute something else, by requiring the property owner to waive his right to constitutional equality and uniformity, as a condition precedent to obtaining equitable relief against an alleged, but utterly void assessment—void because it denies him this right. The proposition is self-contradictory, and we respectfully think, is too absurd to be made more so by any argument. If the state is delayed in the collection of its taxes, it is due to the

fact, and only to the fact, that it has not done that which entitles it to demand, or proceed for the collection of them. The assessment within these constitutional limitations is a condition precedent to the right of the state, and it has no right to complain of delay, or even of loss, produced by its own act in violation of fundamental law.

The distinction between what is merely an alleged *over* valuation of property otherwise legally assessed, and *no* assessment, or what is the same thing, a wholly void attempt to assess property, must not be overlooked. The case of *Albuquerque National Bank vs. Perea*, 147 U. S. 87, was of the character first mentioned. There was no inseparable blending of values of property subject to assessment, with those of property not subject to assessment, nor subject to the jurisdictton of the state. There was not an assessment by an arbitrary rule for ascertaining value, prescribed by act of the legislature and designed, or necessarily operating, to tax the property at many times its value, in violation of the constitutional requirement that the assessment be according to value. In short, it was not an unconstitutional and utterly void assessment, but an alleged erroneous one, of which the only ground of complaint was, that the property was erroneously assessed, not at more than its value, but at a higher ratio of value than other property. This shows nothing more than a mere error of judgment on the part of the assessing officer, or board, and is a very different thing, and presents a very different question, from that which is prasented in the case at bar.

An error of this character does not create an inequality or want of uniformity in the sense of these constitutional limitations. What these constitutional limitations require is, equal and uniform laws and methods of assessment. A mere error of judgment on the part of the assessing officer or board, which, upon proper showing, may be relieved

against, does not violate the principle of equality and uniformity of these constitutional limitations. Such an assessment is not utterly void, it is merely erroneous. It is not the case of an unconstitutional act of the law making power, nor of an act, harmless on its face, administered with an evil and unconstitutional purpose. The *power* of taxation has been constitutionally exercised. In such a case the doctrine that he who asks equity, must first do what equity requires, may very properly be invoked. But this doctrine cannot be applied to the case at bar, where the act of the legislature, and its administration, are in violation of constitutional rights.

In the "*State Railroad Tax Cases*," 92 U. S. 575, it was said, speaking of the parties complaining of the tax: "They must first pay what is conceded to be due, or what can be seen to be due on the face of the bill, or shown by affidavits, whether conceded or not, before the preliminary injunction should be granted." We are not, in this case, seeking a preliminary injunction; nor is anything "conceded" to be due, nor can anything be "seen" to be due, on "the face of the bill," nor has anything been "shown" to be due. The bill was filed and a final decree rendered before any tax was *due*, even if the act of the legislature and the assessment under it were not void; but if this were not true, nothing can be said to be "due" under an utterly void assessment. It was further said in the opinion of this court in the case last cited:

"There is no violation of the constitution, either in the statute, or in its administration by the board of equalization. No property is taxed that is not legally liable to taxation, nor is the rule of uniformity prescribed by the constitution violated. If there is an excessive estimate of the value of the franchise, or capital stock, or both, it is by an error of judgment in the officers to whose judgment the law confided that matter, and it does not lie with the court to

distinct and separable upon the face of the assessments, so that the company being thereby informed of the amount of taxes levied upon each, could be held to have been in default in not tendering such sum, if any, as was legally due. Upon the transcript before us, this question must be answered in the negative. No record of assessment as made by the state board was introduced at the trial, and, presumably, no such record exists, nor is there any documentary evidence of such assessment, except the final communication of the state board to the local assessors, called in the findings, "the assessment roll of the county." That roll shows only the aggregate valuation of the company's franchise, roadway, roadbed, rails, and rolling stock in the state; the length of the company's main track in the state; its length in the county; the assessed value per mile of railway as fixed by the pro rata distribution per mile of the assessed value of its whole franchise, roadway, roadbed, rails and rolling stock in the state; and the apportionment of the property so assessed to the county."

The constitution and laws of the State of California required that fences, being improvements erected upon, or fixed to, land, should be separately assessed, and by the local assessing officers; but in the assessment complained of, it was shown that the fences were included under some one of the several heads, and for this reason the assessment was held to be void, the assessment being made by the state board, instead of by the local assessors. It was further said by this court in the opinion:

"It was then incumbent upon the plaintiff by satisfactory evidence to separate that which was illegal from that which was legal, (assuming for the purposes of this case only, that the assessment was in all other respects legal), and thus impose upon the defendant the duty of tendering, or enable the court to render judgment for such amount, if any, as was justly due."

The inseparable blending of values of property not within the jurisdiction of the state, with values of property within its jurisdiction, is more conspicuous in the case at bar, than was the blending of values in either of the cases above cited, and is the inevitable result of the execution of the Act of the legislature complained of.

Westel W. Morsman

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